

1801206 (Migration) [2019] AATA 2760 (10 May 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1801206
MEMBER:	David Barker
DATE:	10 May 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 10 May 2019 at 10:22am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – financial aspects, social aspects and nature of household not conducive to genuine spousal relationship – inconsistent evidence – credibility issues – medical issues – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65, 359A

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 309.211, 309.221, 309.311

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 January 2018 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 12 April 2017 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained two subclasses: Subclass 309 (Spouse (Provisional) and Subclass 310 (Interdependency (Provisional)). The visa applicant has made claims only for the Subclass 309 visa and does not claim to be in an interdependent relationship as required by Subclass 310.
3. The criteria for the grant of a Subclass 309 visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 because they were not satisfied on the evidence that the parties were in a genuine and continuing spousal relationship.
5. At the present time the review applicant is in Vietnam and very ill. He is suffering from [a medical condition], which has [worsened]. The Tribunal was not satisfied that a favourable decision was possible on the basis of the documentary evidence available to it and liaised with the representative to find a meaningful manner in which the review applicant could participate in the hearing.
6. It eventuated that the review applicant was present during the hearing, which took place on 28 March 2019 by teleconference, with a phone on loudspeaker function being held at his bedside. The Tribunal received oral evidence from the visa applicant and oral submissions from the registered migration agent who represented the parties in relation to the review. The Tribunal also provided time following the hearing for the review applicant to comment on, or respond to evidence provided during the hearing by the visa applicant.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

8. BACKGROUND

9. The visa applicant is a national of Vietnam, and is [age]. She was previously married, from 1995 until June 2016. There are [a number of] children from this relationship. [Some] of these children are included in this application.
10. The review applicant was born in Vietnam and is [age]. He came to Australia in 2009 on a [temporary] visa and is a permanent resident, residing in [State 1]. He was first married from 1983 until it ended in divorce in 2003 and had [children] from that first marriage. His second marriage commenced in January 2009 and ended by divorce in January 2016. There were no children from this second marriage.
11. The visa applicant claims she first met the review applicant in Ho Chi Minh City, Vietnam in December 2014, when the review applicant was visiting his family in Vietnam. The parties

claim that a friendship developed from that time, through communication by phone and electronically. They claim it developed into a committed relationship when they both went on a holiday to do charity work in [Country 1] in June 2016. They held an engagement celebration in Vietnam [in] January 2017, held a wedding [in] January 2017 and registered their marriage in Vietnam [in] February 2017.

12. The review and visa applicants provided documents to the Department of Immigration in support of the application including but not limited to the following: documents regarding their identities and marital status, communication records, financial records, travel records, copies of personal correspondence and other correspondence, the parties' marriage certificate, statements by the review and visa applicants, statutory declarations by friends of the parties and photographs.

13. The review applicant's relationship statement states in part:

I, [Mr A] of [street number provided] [Street 1], [Suburb 1] in the state of [State 1] [postcode] do solemnly and sincerely declare as follows:

1. I am the husband of [Ms B]. I came to Australia in the year 2009.
2. I became a permanent resident of Australia in the year 2011,

Previous marriage — [Ms C]

3. I was previously married to [Ms C]. We were married in the year 1983
4. We have [children] together.
5. We were legally divorced in 2003.

Previous marriage — [Ms D]

6. I married [Ms D] in January 2009.
7. We were legally divorced in Jan 2016. We had separated prior to the divorce more than 2 years.
8. We do not have children together in this marriage.

Meeting and Current relationship with my wife — [Ms B]

9. I met my current wife for the first time in Vietnam in December 2014. We met when I was helping my brother [Mr E] to deliver food to my wife's work place. My brother owns a small food stall close to my wife's work. During this time, we had a chance to talk and exchanged phone numbers. At the time of meeting both my wife and I had separated from our respective spouse.
10. I returned to Australia in January 2015. My wife and I kept in touch by talking on the phone and via Viber.
11. After that, whenever I get a chance, I always visit Vietnam, to see my wife again and to get to know her more.
12. When we talked, we shared our life's stories to each other, and we found a strong connection between us two. I was aware that she and her ex had separated under the same roof and I fully understood them.
13. I found out that she loves to do charity work and volunteering at temples as much as I do. I feel so blessed to find someone like my wife as I feel we are very compatible.
14. In June 2016, while spending [a number of] days in [Country 1] with her, I decided that I need her in my life, and I do not want to live without her. I proposed to her during that trip. We officially lived together as a couple under the same roof on [date].
15. I travelled to Vietnam 5 times since the first time we met, and I love every minute I spend with my [wife]. When we are together we can talk about everything.
16. We also celebrate Tet together. My wife and I also represented my daughter at her wedding in Vietnam.
17. Our engagement was held at my wife's home in Bac Giang [in] January 2017 with family's and friends' blessings.
18. My wife and her children also went to visit my parent's graves in Tien Giang and to visit my relative and to see my hometown.

19. We were very lucky to have my mother-in-law, [Ms F], my brother [Mr G] and my sister [Ms H] (from Australia), held a wedding party for us at [Location 1] [in] January 2017 (at Tan Phu District, Ho Chi Minh City, Vietnam).
20. We went to have our marriage registered on a special day, beings [in] February 2017 and got our marriage certificate issued [later in] February 2017 at the People's Committee of Tan Phu District.
21. The fact that my wife has [a number of] children before she met me does not stop me from loving her. Knowing her past makes me love her so much more. She is honest, hard working, very kind and gentle.
22. I have met and spoken to her children and they love and respect me like their own father. I love them dearly like my own.
23. My wife and I have a happy relationship and our love is sincere as we wish to settle down and establish a future together. We are both matured adults and have given a lot of thoughts into our relationship, also have spent time getting to know each other carefully before committing to marriage.
24. My wife and I have maintained a loving relationship. I am supportive of her application to be with me in Australia.
25. I confirm my relationship is genuine and continuing.
26. We love each other deeply and are committed to each other.

14. The visa applicant's relationship statement states in part:

I, [Ms B] of [street number provided], [Street 2], [Ward 1], Tan Phu District, Ho Chi Minh City, Vietnam, do solemnly and sincerely declare as follow: -

1. I was born on [date].
2. I am the wife of [Mr A] ([DOB])

Previous marriage

3. In 1995, I followed my heart, I moved to Sai Gon with my ex husband, [Mr I] ([DOB]).
4. When my ex-husband and I were together, we had a prosperous business.
5. During our marriage my ex-husband began to change his character. Since the birth of our [child] [a] daughter also, he often drinks, go out, and cursing myself and the children. I thought he was sad because we had [a number of] daughters without a son.
6. I thought the main reason he changed his character was that I could not give birth to a son. Therefore, I tried to work harder in our business and determined to have a son.
7. Sadly, our [child] born in [year] was also a daughter we named her [Ms J]. After this child's birth my ex-husband's attitude worsened.
8. Every time he returned home, he created problems. He was often drunk or cursing me and the children.
9. When my youngest child [Master K] was born [I] thought my ex husband would be a changed man as I had given birth to a son. I thought together we would bring up our [children] happily as he had finally got a son that he always wanted.
10. In 2011 we mutually separated when he told me that he no longer love me and was seeing another woman.
11. It was a very distressful time in my life. I blamed myself for his unfaithfulness. I thought that it was all because of me, that I was too honest and trusted him too much and the end result was that I was deceived. He had overlooked my hardwork and enduance.
12. In order to liberate us we mutually agreed to separate under the same roof as we have [children] together.
13. We finalysed our property settlement the same year of our separation being 2011.
14. Although we had separated in 2011, we did not yet want to divorce as we wanted to both raise the children together under the same roof and to be there for them all.
15. However in May 2016 after a number of years being separated under the same roof and the children subsequently grew older they had began to accept that my ex

husband and I could no longer reconcile. My ex husband had also found love with another woman.

16. Hence in May 2016 we mutually decided to divorce. Our divorce was approved [in] June 2016.
17. Since the divorce my youngest child [Master K] (being the only son in the family) lives with my ex husband as court order. The child also spends time with me and his siblings. I am also contributing to the child support for my youngest son.

Meeting and current relationship with my current husband

18. I have a [factory] which is located near a local food [stall] . This restaurant is owned by [Mr E] (brother of my current [husband]). I usually order food for my staff at this food stall and my children and I also occasionally dine here.
19. I met my husband [Mr A] for the first time in December 2014 on the occasion that he was visiting his brother [Mr E] (owner of the food stall). His brother asked my husband to deliver food to my factory for my employees. During this time whenever my husband delivers food to my factory we would get the chance to talk to each other.
20. During this period, my husband and I exchanged phone numbers. At the time of meeting both my husband and I were separated from our respective spouses.
21. When my husband returned to Australia in January 2015 we sometimes talk on the phone via viber. At the beginning would talk about my work and life in Vietnam and I also ask about this life in Australia.
22. Every time after this whenever he travels to Vietnam we would meet up and spend time together.
23. We share our life's stories to each other, and we found a strong connection between us. We both love to do charity work and volunteering at temples and giving back to the community.
24. In June, 2016, during a [trip] in [Country 1] we decided to commit to our relationship because during this trip my husband proposed marriage to me.
25. Since meeting my husband has travelled to Vietnam on 5 occasions to spend more time with the children and I. When I am with him we can share and talk about everything.
26. During our times together we have socialised with families and friends. We celebrate special occasions such as Tet together and we also represented my husband's daughter at her wedding in Vietnam.
27. With my family and relatives' blessing and friend's congratulations, our engagement was held [in] January 2017 at home, Bac Giang.
28. My children and I also went to Tien Giang, my husband's hometown, to visit his parent's graves, to visit his relatives and neighbour.
29. [In] January 2017, my mother [Ms F], his sister [Ms H] (from Australia), and his brother [Mr G] (from Vietnam) held a wedding party for us at [Location 1] (address no. [street number provided][Street 3], [Ward 1], Tan Phu District, Ho CM Minh City, Vietnam).
30. [In] February 2017, we registered our [marriage]. Our marriage certificate was issued [in] February 2017.
31. We are now happily married and are very happy as a family.

Application to migrate to Australia with my current husband

32. My ex-husband does not agree for my youngest child [Master K] to be included in my partner application as my youngest child is the only son he has. He does not want to part with his son and we have agreed that my son will remain in Vietnam.
33. I state that my marriage to my husband is genuine. We have spent time getting to know each other before deciding to commit ourselves to marriage.
34. My husband has spent time with the children and I. They adore him and he loves them very much especially my youngest son [Master K].
35. We are both matured adults and have given a lot of thoughts into our relationship before committing to marriage.
36. My husband is a wonderful man who loves me and accepts me unconditionally. The fact that I have many children did not deter him from loving me and entering into a

relationship with me has proven to me that he is a loving, responsible and committed person. He is a good husband and a good father figure to my children who adore him.

37. I love my husband very much and sincerely hope that we could be reunited as a family in the near future because we have both had unhappy marriages in our past.

38. We feel fortunate to have found each other. Our wish is to be able to spend the rest of our remaining lives as a couple, to care and love each other.

15. In the delegate's decision record, a copy of which the review applicant provided to the Tribunal, the delegate noted the visa applicant displayed very limited insight into the review applicant's circumstances in Australia and considered this to give rise to the concern the relationship was not genuine. The delegate also noted the visa applicant was unaware of two occasions upon which review applicant travelled to and spent time in Vietnam after their friendship started and that this was an indicator of the lack of the sort of communication between the parties that would usually be found in a couple in a genuine relationship.
16. Prior to the hearings the review applicant provided documents to the Tribunal including, but not limited to: untranslated copies of Viber communication records, photographs, medical reports regarding the review applicant, submissions from the parties' representative, applications for verification of temporary stay, financial records (some untranslated), receipts and travel records.
17. The written submissions from the parties' representative state in part:

The couple's relationship was found not to be genuine due to concerns over the rapid inception of the relationship, insufficient evidence to support claims of development of relationship and the Visa Applicant's lack of knowledge and understanding of her Sponsor (the Review Applicant).

We submit that the Review Applicant and his wife share a genuine and ongoing relationship to the mutual exclusion of all others. They have found love in each other and have been married for over two years now.

Background of the relationship

The Review Applicant first met his wife in December 2014 in Vietnam. The couple was introduced to each other by the Review Applicant's brother [Mr E]. After the Review Applicant returned to Australia in January 2015, the couple started to keep in touch via Viber and phone calls. Phone conversations between the couple continued and their relationship developed as their connection and understanding of each other grew.

In June 2016, during a [trip] to [Country 1], the Review Applicant confessed his love to his wife and she reciprocated her feelings.

[In] January 2017, the couple held their wedding in Ho Chi Minh City, Vietnam before guest of their family and friends and legally became husband and wife [in] February 2017. The Visa Applicant lodged a valid application for Partner (Temporary) (class UF) (subclass 309) / Partner (Residence) (class BC) (subclass 100) visa on the 12 April 2017.

On the 11 November 2017, a face-to-face interview was conducted with the Visa Applicant. On the 15 January 2018, the Department of Home Affairs refused the Visa Applicant's application.

An Application for Review in respect of the Decision Refusal was lodged and the matter is now before the AAT for reconsideration.

Evidence submitted with this current application before the AAT

We respectfully submit the following documents in support of the Applicant's application:

Photographs of the couple from the year 2016 to 2019

- Temporary household registrations
- Money transfer receipts
- Evidence of the couple pooling finances together in Vietnam

- Evidence of contacts between the Visa Applicant and the Review Applicant
- Evidence of the Review Applicant's current health status

Financial Aspects of the relationship

It is submitted that it would be difficult for the couple to pool financial resources as they live in different countries. However, the Review Applicant has been sending money to the Visa Applicant since their courtship. Furthermore, the couple has a saving bank account in Vietnam. The couple plan to save and combine their money together when the Visa Applicant and her dependent children are able to migrate to Australia.

The Nature of Household

The couple are now residing together in Vietnam as the Review Applicant is very sick. The Review Applicant wants to spend his time with his family in Vietnam being the Visa Applicant and her children. The Visa Applicant is taking care of the Review Applicant and is responsible with the cooking, cleaning, washing and shopping. The Visa Applicant is also helping the Review Applicant with his ADLs such as bathing, toileting, feeding and mobilising.

Prior to his illness, when the Review Applicant travelled to Vietnam the couple would jointly take responsibility to the household responsibilities; the couple also are jointly responsible for the care and wellbeing of the dependent children.

The couple acknowledge that the Review Applicant has spent a vast majority of time in Australia than Vietnam however the couple maintained contact with each other during their periods of separation. The couple have every intention to establish a family and household in Australia when they are reunited.

Social Aspect of the Relationship

The Review Applicant and the Visa Applicant represent themselves as a couple to their family, friends and wider community prior to the Review Applicant falling sick. The couple enjoy undertaking social activities with each other and with their children.

The issue of no evidence supporting the claims that the parties met during the Review Applicant's trip to Vietnam in December 2014 is explained by the couple simply as the couple's relationship did not become serious until June 2016.

The Decision record makes note of the social aspects of the couple's relationship elaboration by the Delegate Officer that the couple's engagement ceremony and wedding ceremony did not follow traditional expected protocol. We submit that this statement is unreasonable as each individual has the prerogative to celebrate the occasion however they wish.

At their relationship announcement party, the couple did pray in front of the ancestral altar and the couple represent themselves as a couple to their family members. We submit that the absence of following engagement traditions at the engagement party does not suggest that the relationship is not genuine.

At their wedding ceremony, the couple did pray in front of the ancestral altar at the Visa Applicant's home, they did have house decorations, altar decoration and exchanged gifts as a traditional wedding ceremony would be. Their wedding ceremony was held [in] January 2017. The occasion was attended by the families from both sides and their friends. Their wedding reception was held on the same date at a local restaurant and was attended by the families, friends and neighbours who came to support and celebrate the union of the couple.

We submit that those photos submitted to the Department were not being contrived for the purpose of the application as the Delegate Officer suggested and the couple have no reason to do so. The Visa Applicant and the Review Applicant are in a genuine and ongoing relationship.

The Delegate Officer also stated that *'there is limited evidence to indicate that they have, or they intend to, undertake regular joint social activities, holidays or short breaks together, that they have attended any significant events together or that they together belong to any*

organisation or groups'. We submit that this statement is incorrect. First, The Review Applicant and the Visa Applicant have submitted a numerous amount of evidence indicating their joint social activities such as attending the Review Applicant's daughter's wedding in Vietnam, going to temples together, attending death anniversary of the Review Applicant's father, etc. By attending these events, we submit that the Review Applicant and the Visa Applicant present themselves to family and friends as being in a committed partner relationship, and are regarded by people as such. In addition, as the couple live separately in two different countries, it is difficult for them to undertake joint social activities, however the couple have been trying their best to be together, and whenever the Review Applicant travels to Vietnam to see his wife, they always spent all of their limited time together.

The Nature of the person's commitment to each other

The Department noted that the Visa Applicant demonstrated little knowledge of her Sponsor at interview in relation to the number of trips the Review Applicant has made to Vietnam since their first met in December 2014 as well as his work in details. We submit that this is incorrect and that the Visa Applicant had truthfully demonstrated her knowledge regarding her husband's nature of work. As he works in a [Industry 1] environment, it is difficult for the Visa Applicant to understand the type of work. She is not familiar with the [business] or the activities surrounding this occupation.

The Visa Applicant was not be able to specify how many trips the Review Applicant made to Vietnam since their first met in December 2014 simply because she could not remember. The Review Applicant has made a several trips to Vietnam to see his wife and evidences of these trips were submitted with this application for the Tribunal to reconsider.

The couple are true to their marriage vows and are there for each other in health and in sickness.

Other issues — Allegation received by the Department

We note Folio 233 of the FOI file indicates the Department received an allegation on 08 August 2017 that the couple's relationship is contrived. The Visa Applicant was interviewed on 11 November 2017 but the Delegate Officer did not raise this matter to the Visa Applicant for her response. We have been instructed the couple knows that the person putting in the allegation is the Sponsor's ex-wife [Ms D]. Ms [D] recently admitted to the Sponsor and the Visa Applicant that she had intentionally put in the allegation out of spite as she was still in love with him, however seeing that he is now very sick she decided to make the admission because she was feeling guilty and remorseful for her actions (She was the only person who knew his passport number as she previously sponsored him to Australia) It is hope that the Tribunal Member would consider all the evidence submitted and finalise the case as soon as possible.

18. TRIBUNAL HEARING

19. *Visa applicant's evidence*

20. With respect to current state of her husband's health, the visa applicant said his illness is serious but at the moment is not getting worse. She said he was admitted to hospital [in] March 2019 and then discharged to her home [in] March 2019. She said the doctors have not given her any indication of her husband's prognosis, but have indicated that it is now appropriate for him to be looked after at home. She said that he goes to the hospital to have [treatment] and is also on medication, which he can have at home.
21. In response to the Tribunal asking the visa applicant what their plans are, in light of the very serious health issues currently confronting her husband, she said her wish is that her husband be treated and recover from his illness so that he can stay with her and the family. She said he is currently staying in the family home with her and [some of her] children. She said her youngest child is living elsewhere, with his biological father.

22. The Tribunal asked the visa applicant, in light of the very serious state of the review applicant's health, whether the plan was for them to return and set up a household in Australia, or to look after him for the time he has remaining in her family home in Vietnam. The visa applicant did not respond to this question and it was not clear whether she did not understand this question, or whether she did not wish to respond to it. The Tribunal sought oral submissions from the representative as to whether there were cultural factors around the care of gravely ill people which may influence the visa applicant's response to this question and the representative did not provide a clear indication of whether there were, or were not any relevant cultural factors.
23. The Tribunal noted that the submissions received with the review application indicate that she and the review applicant plan to save and combine their money to provide for their and her [daughter's] needs when they migrate to Australia. The Tribunal asked how this would be possible, on a practical level, if her husband was too unwell to return to work. The visa applicant said that it would be good if they could travel to and remain in Australia, as the review applicant would be able to access medical and welfare care in Australia at no cost. She said that whilst the review applicant is in Vietnam, she has to pay for his medication and hospital accommodation. She said that if they can travel to Australia, she will sell her house in Vietnam and with funds from that sale, buy a house for the family in Australia. She said that if they can come to Australia, she would look after her husband and also care for her children. She said her house in Vietnam is worth around VND[specified amount].
24. The Tribunal asked the visa applicant how she would support herself and her [daughters] if they come to Australia. She said she has some money saved and if they can get to Australia, she would work to raise money for the family. The visa applicant said she would also assist her husband's daughter in Australia, who was the owner of a restaurant in Australia, or she would work in a nail business. In response to a question from the Tribunal as to what savings or financial assets the review applicant has in Australia, the visa applicant said when he was well, the review applicant worked as a [Occupation 1], but that he doesn't have many savings left, as he spent money on their wedding and also sent money to her. She said he also spent money to sponsor her so that they could be united in Australia.
25. In response to a question from the Tribunal as to whether the parties have any shared assets, the visa applicant said they have a joint account in Vietnam with a current balance of around VND[specified amount]. She said they each contributed to this amount and that the purpose of establishing a joint account was to save money and also earn interest from the account. Tribunal noted that amongst the photographs provided with the review application were a photograph of her and the review applicant in a bank together and also a photograph of them both holding cash. The visa applicant said this was to show that they go to the bank together. In response to further questions, the visa applicant said she and the review applicant have no shared liabilities, or financial obligations with respect to each other, or other people.
26. The Tribunal asked the visa applicant about the review applicant's current care needs and what her role is in providing these needs. She said in the morning she assist's her husband to get out of bed and attend to his hygiene tasks, such as washing his face and helping him with toileting. She said that she then prepares breakfast for the review applicant and gets him to take his medication. She said that he then needs to rest and she helps him return to his room and then gives him a massage. The visa applicant said she prepares lunch for her husband, assists him to eat and to have a drink and then helps him back to his room, so that he can rest. She said that in the afternoon she assists him to take a bath and then takes him for a walk. The visa applicant said that in the evening she prepares dinner for the review applicant and during the night, lies at his side in their bed so that she can assist him if he needs to go to the toilet.

27. Tribunal asked the visa applicant about the proposed nature of the parties' household arrangements if the visa is granted. She said that her children are all grown up and they will be able to assist her to look after the review applicant if they are permitted to return with him to Australia and set up a household here. She said that her daughters are aged [specified]. The visa applicant said that the plan is that they will initially rent a house and then, if it is possible, they will buy a house. She said that the review applicant's daughter would also assist them to purchase a house in Australia.
28. In response to a question from the Tribunal about the review applicant's household arrangements before he returned to Vietnam in February 2019, the visa applicant said he was renting a room in in [City 1] and had lived in that accommodation for around a year.
29. The Tribunal invited the visa applicant to respond to the concern raised in the delegate's decision record that her limited understanding of the review applicant's circumstances in Australia and the rapid development of her relationship with the review applicant was an indicator that the relationship may not be genuine; rather, it was contrived to assist her to get permanent residency in Australia. In response, the visa applicant said that her relationship with the review applicant is genuine. She said that when he was healthy, they loved each other and became wife and husband. She said that now that he is seriously ill, she is still by his side and assisting him. She said she wants to keep looking after him and that she is committed to remaining in the relationship until the review applicant gets better.
30. The Tribunal noted that included with the review application were untranslated electronic communication records. The visa applicant said the records were provided to show how frequently and regularly she and the review applicant were communicating with each other.
31. The Tribunal asked the visa applicant if she would like to comment on the photographs provided with the review application and she said these were to show their relationship is genuine and supported by their families.
32. Tribunal put to the visa applicant that in a relationship statement prepared by her, dated 24 March 2017, she claimed at paragraph 22 that after the review applicant returned to Australia in January 2015, they spent time together whenever he travelled back to Vietnam. The Tribunal noted that in paragraph 25 of this document the visa applicant stated that the review applicant returned to Vietnam on five occasions after their initial meeting, to spend time with her and her children. The Tribunal put to the visa applicant that when interviewed by the delegate from the Department, she said that she had had no direct contact with the review applicant from when he returned to Australia after their first meeting in January 2015, until June 2016, when they both travelled to [Country 1] together. The Tribunal noted that the delegate commented that the visa applicant was unaware the review applicant had returned to Vietnam again in January 2015 and then in the December 2015 to January 2016 period. The Tribunal noted that these were two of the five occasions upon which the review applicant had returned to Vietnam in the period referred to in the relationship statement she prepared in March 2017.
33. In response to a question as to whether she wished to comment on the apparent inconsistency between her claim to have spent time with the review applicant each time he returned to Vietnam and her lack of awareness of two of the five occasions on which he had returned to Vietnam, the visa applicant said she and the review applicant first met each other in December 2014. She said the only occasion where he did not inform when he returned to Vietnam was the second trip he made in January 2015. She said the reason he did not inform her at that time was because he was in a hurry. She said that apart from that occasion they met with and spent time with each other on all other occasions.

34. In response to a question from the Tribunal, the visa applicant said she did not have contact with the review applicant's daughter during the trip he made to Vietnam in late 2014 when the parties first met.
35. In response to a question as to whether she had anything else she wished to say to the Tribunal, the visa applicant said that she and the review applicant have passion for each other. She said they love each other and that she wants to look after him even now that he is seriously ill. She said that she wishes that the illness could be healed and that they could have a good life together.

36. Particulars of Information put to the review applicant pursuant to s.359A of the Act

37. There are discrepancies and inconsistencies in the visa applicant's evidence about the history and nature of the parties' relationship and that contained in evidence previously provided by the parties and information in the Department's file. The Tribunal put relevant discrepancies and inconsistencies to the review applicant following the hearing in accordance with s.359A of the Act. The Tribunal explained why the information was relevant and the consequence of it relying on it. The review applicant was provided the statutory time to comment or respond. The particulars of the information put the review applicant were as follows:

- a) In relationship statements you and the visa applicant provided to the Immigration Department with her visa application, you both state that whenever you travelled back to Vietnam, after you returned to Australia in January 2015 following your initial meeting, you would meet and spend time together.

When interviewed by officials from the Immigration Department on 14 November 2017 the visa applicant was asked when was the second time she met you in person, to which question she answered it was [in] June 2016.

The visa applicant was also asked if you had returned to Vietnam in the period from when you returned to Australia in January 2015 after your first meeting and June 2016, to which question she answered no and indicated that if you had travelled to Vietnam in that period you would have met up with her.

Whereas

The Immigration Department's records show you travelled to Vietnam [in] January 2015 and returned to Australia [in] February 2015 and the again travelled to Vietnam [in] December 2015 and returned to Australia [in] January 2016.

When asked about her lack of knowledge of these trips during her interview with the Immigration Department officials in November 2017, the visa applicant indicated she did not know about those trips and claimed that if you had travelled to Vietnam you would have met up with her because you were friends.

When, during the hearing, the visa applicant was invited to comment on her lack of knowledge of these two trips you had taken to Vietnam without spending with her, she said the only occasion where you did not inform her when you returned to Vietnam was in January 2015 shortly after you had departed and that the reason you did not inform her at that time was because you were in a hurry. The visa applicant said that apart from that occasion you met on each other occasion you visited Vietnam in that period of time.

This information is relevant as the visa applicant's responses, when interviewed by Immigration Department officials in November 2017, show her lack of knowledge about two occasions in which you travelled to Vietnam in which you did not meet her, or spend time with her. This was during the period you both claim you met up with each other on each occasion you travelled to Vietnam after your initial meeting. During the hearing she maintained she

had contact with you on each occasion, apart from when you returned to Vietnam in January 2015, despite her previous responses to Immigration Department officials, which show she was unaware you had travelled to Vietnam in the December 2015 to January 2016 period, without meeting up with, or spending time with her.

This gives rise to the concern that the information provided by you and the applicant is not reliable and this may affect the weight the Tribunal places on the evidence provided about this and other aspects of your relationship.

- b) During the hearing on 27 March 2019 the visa applicant gave oral evidence that she had no contact with your daughter during the trip you made to Vietnam from December 2014 to January 2015, in which you first met.

When interviewed by Immigration Department officials in November 2017, the visa applicant said your daughter did not accompany you to Vietnam on that trip and also said she not could not remember when she first met your daughter and that she did not know why your daughter could not travel to Vietnam to attend your and the visa applicant's wedding.

Whereas

The Immigration Department's records show your daughter travelled to Vietnam with you between the following dates: [December] 2014 to [January] 2015; [January] 2015 to [February] 2015; [December] 2015 to [January] 2016; [September] 2016 to [September] 2016.

The Immigration Department's records show you travelled to Vietnam [in] June 2016 and that your daughter travelled to Vietnam [in] July 2016 and then returned to Australia with you [in] August 2016.

The Immigration Department's records show you travelled to Vietnam [in] December 2016 and that your daughter travelled to Vietnam [in] January 2017, less than a week after your wedding to the visa applicant.

This information is relevant to the decision under review as the Tribunal may find there is a close relationship between you and your daughter, evidenced by your frequent travel to Vietnam together. This finding would be relevant as the visa applicant's responses when interviewed by Immigration Department officials in November 2017, where she claimed your daughter did not accompany you to Vietnam in the December 2014 to January 2015 period and that she did not remember when she first met your daughter and did not know why you daughter could not travel to Vietnam to be at your wedding ceremony.

This is relevant because the visa applicant did not display the knowledge of your daughter, when interviewed by Immigration Department officials in November 2017 that would usually be found in a member of a couple where there was communication about important family matters.

This information is also relevant as your daughter's movement records indicate she was in Vietnam and in contact with you very soon after you and the visa applicant claim you started a committed relationship, yet the visa applicant could not recall when interviewed by Immigration Department officials in November 2017 if she had contact with your daughter after such a significant event in your and the visa applicant's circumstances.

This information is also relevant as your daughter's movement records indicate she was in Vietnam within a week of the date of your wedding celebration, which gives rise to concern as to why such important events as your engagement and wedding could not have been scheduled so as to provide your daughter with the opportunity to attend these events. This gives rise to a concern that you and the visa applicant arranged your marriage, not because you are in a genuine relationship, but rather, for the purpose of facilitating the visa applicant's

efforts to get a visa providing a pathway to permanent residency in Australia for herself and her [daughters].

If the Tribunal relies on some or all of this information it may not be satisfied that you and the visa applicant may not be living together, or not living apart on a permanent basis, in a genuine and continuing relationship and that you do not have a mutual commitment to each other as husband and wife, to the exclusion of all others. This may indicate that the visa applicant may not meet the definition of 'spouse' in regulation 1.15A of the Migration Regulations 1994.

If the Tribunal finds that the visa applicant was not your spouse at time of application and is not so at the time of decision, it will affirm the decision to refuse the application for the Subclass 309 Partner visa.

38. On 23 April 2019 the Tribunal received a response from the parties, which relevantly stated:

I have received the letter from the AAT requesting for clarification regarding certain issues raised. I wish to respond as follows:

Lack of knowledge of my husband's trips to Vietnam between January 2015-June 2016
I met my husband for the first time in December 2014.

At the interview I was not aware of my husband's trip to Vietnam in January 2015 as we did not meet up on this trip because we were merely friends.

The second time I met him in Vietnam was between December 2015-January 2016, during this trip we went out to eat, and our relationship developed to one of love. I remember telling the interviewer this. However when I was interviewed I said I did not see my husband during these two trips which is incorrect because I did see him between December 2015-January 2016. I was very confused as I was asked so many questions on the day of the interview, the nervousness and the pressure just made it worse.

When I responded that 'if he travelled to vn then he will meet me' I was referring from when our relationship developed being December 2015 because it was from this time that we saw each other on each of his visits to Vietnam. I should have clarified this at the interview with the Embassy.

In my statement submitted to the Embassy, I stated that my husband has met me 5 times since meeting, this statement is correct because he has been back to see me 5 times, excludes the time we did not meet up between [day]/01/2015-[day]/02/2015.

My husband has travelled to Vietnam on many occasions, I and our marriage is still ongoing as I am currently caring for him.

My step daughter's visits to Vietnam and why she was not present at our wedding

My husband and my step daughter have a very close relationship and she frequently travels to Vietnam with my husband. When I first met my husband in December 2014 my step daughter was not with him. Hence when interviewed with the Embassy I told them that my step daughter was not with my husband during the December 14 trip meaning she was not with him when I met him.

My husband and I did invite my step daughter to our wedding but she said she could not go. She did not give us a reason and we respect her decision as she was an adult and we could not force her to attend.

At the time of interview the interviewer asked me why my step daughter could not travel to Vietnam to attend our wedding and I responded that I did not know. This response is the truth.

After I receiving the letter from the AAT dated 05 April 2019, we showed our step daughter the letter and asked if she could help us with the response. She explained to us that she prefers

not want to travel to Vietnam to attend our wedding as she wanted to spend time with her husband in Australia. However [in] January 2017 she was forced to make the trip to Vietnam urgently as her birth mother was seriously ill and had to undergo surgery [in] January 2017. Please find enclosed confirmation of surgery for Ms [C] (birth mother) of my step daughter.

My husband and I love each other and want to live together as a family. He is very ill and I am looking after him.

The fight to be together has been very stressful for us. We would not have fought so hard to be together if we were not genuinely in love and committed to each other.

I simply ask that the Tribunal Member would consider all the responses and take into account all the evidences into consideration

CONSIDERATION OF CLAIMS AND EVIDENCE

39. The issue in the present case is whether the visa and review applicants were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
40. The circumstances of the review applicant in the present case are most unfortunate. The medical evidence provided with the review application indicates he suffers from [a medical condition] which is at an advanced stage. The evidence indicates he was diagnosed with [the medical condition], which has [worsened], resulting in him being [immobile]. He was discharged from [Hospital] in late January 2019 and travelled to Vietnam [in] February 2019, where he spent a further period in hospital before being discharged to the care of the visa applicant in her home.
41. The Tribunal acknowledges the very difficult and trying circumstances that are present in the current case, but is mindful that notwithstanding these circumstances, the Act requires a range of criteria to be met in order for the visa application to be successful. Accordingly, the Tribunal has had regard to the documentary evidence that has been presented with the visa and review applications, which is contained in the Department and Tribunal files. The Tribunal has considered the visa applicant's oral evidence. The Tribunal has also considered some information that was not provided by the review applicant and where appropriate has invited the review applicant to comment on this information in accordance with the Act's procedural requirements.
42. *The response to the particulars of information put to the review applicant pursuant to s.359 of the Act*
43. The Tribunal is not satisfied the applicant has provided a convincing explanation for the inconsistency in the evidence regarding contact between the parties other during the period they claim their relationship developed. In relationship statements the parties prepared and signed in March 2017, which were provided to the Department with the visa application, they claim to have had contact and spent time together on all five occasions on which the review applicant returned to Vietnam after their initial meeting in December 2014. The review applicant's movement records indicate he travelled to Vietnam from Australia on five occasions in that period. However, when interviewed by the Department in November 2017, the visa applicant was unaware of two of these trips, which took place in late January 2015 and in the December 2015.
44. In her oral evidence during the hearing the visa applicant gave evidence that apart from the further trip the review applicant made in January 2015, she met with and spent time with him on all other occasions he returned to Vietnam between December 2014 and March 2017. In the response to her comments being put to the review applicant pursuant to s.359A of the

Act, the parties claimed they had contact with each other for the second time when the review applicant travelled to Vietnam between December 2015 and January 2016. The visa applicant claims she provided an incorrect response when interviewed by the Department due to feeling nervous and pressured due to the amount of questions she was asked. The Tribunal acknowledges the visa applicant may have felt nervous and under pressure, but is not persuaded why this would have led her to provide incorrect responses to questions such as, *'Did you ever meet the sponsor (review applicant) from January 2015 to June 2016'*, *'Did the sponsor travel to Vietnam from January 2015 to June 2016'*, to both of which questions she answered in the negative and maintained if the visa applicant had returned to Vietnam in that period he would have met up with her.

45. In the response to the s.359A letter, the parties claim the visa applicant meant something other than what she acknowledges she said to the Department in November 2017. The visa applicant now claims that when questioned about her perception that the review applicant had not returned to Vietnam until June 2016, her responses had actually referred to a trip the review applicant made to Vietnam in December 2015. The Tribunal is not persuaded by this claim, or by her claim she had in fact met with the review applicant on five return trips he made to Vietnam since their initial meeting in December 2014. The Tribunal acknowledges the representative's submission that the lack of evidence that the parties met and spent time with each other from December 2015 to January 2016 was because their relationship did not become serious until June 2016, but without such evidence the Tribunal is not satisfied the visa applicant's claim with regard to this issue can be relied upon.
46. In the response to the s.359A letter, the parties claim the visa applicant meant something different in her interview with the Department, where she claimed the review applicant's daughter did not accompany him to Vietnam in the December 2014 to January 2015 period. She now claims that what her response actually meant was that the review applicant's daughter was not with him at the time she first met the review applicant. The Tribunal has noted the s.359A response does not address the concern that the visa applicant told the Department that she did not remember when she first met the review applicant's daughter.
47. The Tribunal does accept the visa applicant's claim that she told the Department that she did not know why the review applicant's daughter did not attend the parties' wedding and that the parties had not thought to discuss this issue with the review applicant's daughter until after receiving the s.359A letter from the Tribunal.
48. The Tribunal notes the claimed explanation provided, namely that she had not attended this event as she wished to spend time with her husband in Australia, but then travelled to Vietnam shortly after the wedding because her mother was seriously ill. The parties have provided a medical certificate in support of this claim, which indicates she was hospitalised from [January] 2017 to [February] 2017 with a diagnosis of [specified medical conditions].
49. The Tribunal is not persuaded that the s.359A response resolves the concern that the visa applicant, when interviewed by the Department, did not display the knowledge of the review applicant's daughter that would usually be found in a member of a couple where there was communication about important family matters. The s.359A response has also not resolved concern arising from the lack of involvement of the review applicant's daughter, with whom he has a close relationship, in the parties' wedding.

50. **Credibility**

51. The Tribunal has formed the view that the parties have not provided an adequate explanation for concerns raised in the s.359A letter and is satisfied that this does give rise to concern about the overall reliability of their claims about their relationship.

Whether the parties are in a 'spouse' relationship

52. Clause 309.211(2) and cl.309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is a permanent resident of Australia.
53. 'Spouse' is defined in r.1.15A of the Regulations and provides that a person is the spouse of another where the two persons are either in a married or de facto relationship. Persons are in a de facto relationship if they are not validly married to each other. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: r.1.15A(1A). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

54. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
55. The couple registered their marriage in Vietnam in February 2017. A translated certificate of marriage from the Vietnamese authorities was submitted to the Department.
56. The Department's file also includes a copy of Divorce order's in respect to the review applicant and visa applicant's previous marriages. There is nothing before the Tribunal to suggest the parties' marriage is not valid.
57. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

58. *Financial aspects of the relationship*

59. In considering the financial aspects of the parties' relationship, the Tribunal recognises that the parties have resided in different countries and that this can influence the extent to which they have combined their finances.

60. *Joint ownership of real estate or other major assets*

61. The evidence does not demonstrate that the parties own any property together. Prior to travelling to Vietnam in February 2019, the review applicant was renting a room in shared accommodation in [Suburb 1], [State 1]. The visa applicant is reported to own a residential property in Vietnam, which she values at VND[amount], which is equivalent to around AUD[amount]¹. A joint account established by the parties at a Vietnamese financial institution had a balance of VND[amount] in May 2018, which is equivalent to around AUD[amount]. During the hearing, the visa applicant gave evidence there was a balance of around VND[amount] in this account. The Tribunal is unclear if the discrepancy in these amounts was due to the visa applicant not clearly communicating with the Tribunal and in this

¹<https://www.xe.com>

instance has given her the benefit of the doubt and taken the amount held in this joint account remains essentially the same as it was in May 2018.

62. Translated documents provided with the review application include invoices regarding the purchase of mobile phones and household white goods in December 2017. These invoices identify the review applicant as the purchaser and that items were paid for in cash. The Tribunal notes there is no explanation as to who provided the funds for the purchase of these items, or with regard to what specific purpose they were put. The Tribunal is not persuaded this evidence demonstrates the aforementioned receipts establish the items purchased should be regarded as shared assets.

63. *Joint liabilities*

64. The parties have no shared liabilities.

65. *The extent of any pooling of financial resources, especially in relation to major financial commitments*

66. The Tribunal has reviewed photographs showing the parties at a financial institution in Vietnam and of them sitting with each other holding cash. The notation with these photographs is that they are evidence of the parties' pooling funds. The Tribunal does not accept this claim. The photograph of them holding cash in their hands appears staged and the Tribunal places no weight upon it. A photograph of the parties in a financial institution establishes nothing beyond the mere fact that they elected to be photographed in this setting.
67. The review applicant has sent funds to the visa applicant. Remittance receipts provided to the Department show AUD[amount] was sent to the sponsor between 2015 and November 2016 and documents provided to the Tribunal show further amounts equivalent to AUD[amount] and AUD[amount] were respectively sent in May and September of 2017. The Tribunal accepts the review applicant sent these funds to the visa applicant. It is not apparent to what use they were put and as the visa applicant's financial situation in some respects appears to be better than that of the review applicant, especially in relation to their assets, it is unclear why the visa applicant required this financial support.
68. The funds held in a joint account in Vietnam are described by the visa applicant as for savings and investment purposes. The Tribunal has placed only limited weight on these funds as there is no objective evidence to support the visa applicant's claim that she and the review applicant contributed equal funds into this account.
69. The visa applicant claims that the review applicant's savings were depleted by his contribution towards their engagement and wedding celebrations and the cost of the visa applications for her and her [daughters]. The Tribunal is not satisfied that there is any objective documentary evidence to support this claim.

70. *Whether one person in the relationship owes any legal obligation in respect of the other*

71. There is no indication the parties have any legal obligation with respect to each other.

72. *The basis of any sharing of day to day household expenses*

73. The visa applicant gave evidence she is currently paying for the review applicant's medical expenses. He is reported to be staying in her home and, given her evidence as to his lack of

savings or other financial assets, the Tribunal presumes the visa applicant is also feeding the review applicant and paying for other essential items he requires.

74. Prior to this current situation, the parties appear to have been essentially meeting the costs associated with their respective day to day household expenses in the respective countries they were residing in. There is no indication the joint account they established in Vietnam is being used to meet shared day to day household expenses.

75. *Overall assessment of the financial aspects of the parties' relationship*

76. With respect to the financial aspects of the parties' relationship the representative submits that it has been difficult for the parties to pool their finances, as they were, certainly at the time of application, living in different countries. The Tribunal accepts this submission and notes that with the exception of an amount around AUD[amount] remitted to the visa applicant by the review applicant in the period from 2015 to 2017, and a joint account upon which the Tribunal has placed limited weight, there is no evidence of the parties' pooling of their finances towards major financial commitments. The Tribunal has placed some weight on the visa applicant's claims that she is meeting the review applicant's current medical costs. However, there is no indication that either at the time of application, or at the time of this decision the parties had shared assets of any note, shared liabilities or financial obligations to each other.
77. The parties' have previously claimed that they will continue to save their money and in combining their incomes would have the capacity to buy a home in Australia and establish a viable shared household for themselves and the visa applicant's [children]. On the basis of the parlous state of the review applicant's health because of the advanced state of his [medical condition], the Tribunal is unfortunately not persuaded this remains a viable claim. In forming this view the Tribunal acknowledges the evidence as to the review applicant's limited savings and future earning potential, as well as his lack of property or other assets in Australia or elsewhere. The Tribunal also acknowledges the visa applicant's claim to have a property asset in Vietnam, which she claims she could sell and apply funds from that sale to purchasing property in Australia. The Tribunal is not persuaded this asset is a shared asset, or that a possible prospective property purchase by her in Australia demonstrates the parties have to date merged their financial affairs to any significant extent.
78. In considering the overall financial aspects of the parties' relationship, the Tribunal is not satisfied they provide more than limited support to the contention the parties were at the time of application, or at the time of this decision, in a genuine spousal relationship.

79. **The nature of the household**

80. *Joint responsibility for the care and support of children*

81. The review applicant has [children] from a previous marriage and there is no suggestion he and the visa applicant have any ongoing responsibility for the care and support of these [children].
82. The visa applicant has [a number of] children from her previous marriage. Her youngest child, a son, is reported to reside with her previous husband. The visa applicant claims she separated from her previous husband in 2011, but did not formally divorce him until June 2016. Information provided by her with the review application indicates she and her previous husband resided in the same household, under the same roof, until their divorce in 2016. She claims her previous husband had a clear wish to have a son, but there is no evidence before the Tribunal to establish he did not have ongoing responsibility for the care and support of all [of] the children from his union with the visa applicant up until he is reported to

have moved out of the household they shared until the divorce in June 2016. There is also no evidence to demonstrate he has ceased taking some responsibility for their care and support since that time.

83. The representative submits that the review applicant and visa applicant are jointly responsible for the care and wellbeing of the dependent children, which the Tribunal has taken to be the visa applicant's [daughters]. The Tribunal is not satisfied that this claim is supported by the available evidence. Whilst the photographs provided to the Tribunal show the parties in company with the visa applicant's children, there is no evidence which would demonstrate the review applicant was sharing costs associated with the care of the children or taking any responsibility for their care, at the time of application in April 2017 or at any intervening period until the present day. The Tribunal has also formed the view that the review applicant is demonstrably unable at the time of this decision to have any significant responsibility for the care and support of the visa applicant's children, due to the state of his health and his own care needs.

84. *The living arrangements of the parties*

85. Documentary evidence provided with the review application includes petition for certification of temporary stay documents in relation to the review applicant from the Vietnamese authorities covering periods from: [January] 2017 to [later in] January in Bac Giang Province; and from [September] 2016 to [later in] September 2016, [January] 2017 to [March] 2017 and for a period not specified from [December] 2017 in Ho Chi Minh City. The Tribunal accepts the parties' stayed together on these occasions, but is not persuaded they demonstrate they established a shared household together during these periods. The Tribunal has accordingly given little weight to these documents.
86. Photographs provided with the review application include those showing the parties together in residential settings in Vietnam. The Tribunal has placed some weight on this evidence and accepts the review applicant has spent periods of time in the home of the visa applicant.
87. The visa applicant gave plausible evidence in relation to the care and support that she is at present providing the review applicant in her home. On the basis of this evidence, the Tribunal accepts that at the time of this decision, the review applicant is being cared for in the home of the visa applicant.

88. *Sharing of the responsibility for housework*

89. It is quite apparent the review applicant has no such responsibilities at the present time, due to the impact of his illness. The Tribunal accepts the visa applicant, by necessity, is responsible for tasks associated with running the household in Vietnam.
90. As to the circumstances around the time of application in April 2017, in the submissions from the representative there is the claim that prior to his illness, when the review applicant travelled to Vietnam, the couple would jointly take responsibility for household responsibilities. The Tribunal is not satisfied the available documentary and oral evidence supports this claim, as the parties make no mention of the basis for any sharing of responsibility for housework prior to the onset of the review applicant's illness. There are some photographs of the parties shopping and in other domestic contexts, such as a photograph of the parties looking at the meat section in a food store. The Tribunal accepts this evidence, but has placed only limited weight upon it as an indicator that the parties had shared responsibility for housework around the time of application, as the photographs are not dated.

91. *Overall assessment of the nature of the parties' household arrangements*

92. In her written submissions, the representative submits that the parties acknowledge the review applicant has spent a vast majority of his time in Australia, rather than Vietnam. The review and visa applicants have not claimed otherwise in their written declarations or in the visa applicant's oral evidence during the hearing. The extent to which the parties have had contact with each other during times the review applicant has been in Vietnam since their relationship began is in dispute and the Tribunal is not persuaded by the visa and review applicants' explanation of the discrepancies in the evidence with regard to this issue.
93. The Tribunal notes the review applicant has numerous relatives in Vietnam, including [siblings]. The evidence demonstrates that the review applicant and his daughter have visited Vietnam regularly over a period of years, either together or in circumstances where they were both in Vietnam at the same time. The evidence would suggest that the review applicant has access to places to stay within his own extended family network and the Tribunal is not persuaded the parties have shared a household to the extent claimed during the review applicant's trips to Vietnam since 2015. As a consequence, the Tribunal is not satisfied the evidence demonstrates the parties' had shared a household to any significant degree at the time of application in April 2017.
94. The Tribunal accepts the review applicant is currently being cared for, when not hospitalised, by the visa applicant in her home and has placed some weight upon this factor.

95. **The social aspects of the relationship**

96. The Tribunal has reviewed photographs provided with the review application and notes these include more recent photographs in which the review applicant is clearly unwell. Other photographs reflect earlier periods of time and appear consistent with the photographs that are referred to by the delegate as being provided with the visa application.

97. *Whether the persons represent themselves to other people as being in a married relationship with each other*

98. The parties claim they represent themselves as a couple to their family, friends and the wider community, both prior to the review applicant becoming unwell and since that has occurred.
99. The Tribunal has reviewed photographs of the parties' engagement, which the parties claim was held at the visa applicant's mother's home in Bac Giang province. The Tribunal has also reviewed the photos of the parties wedding and reception in Ho Chi Minh City and the Tribunal accepts that these photographs show the events were attended by some members of the parties' families who reside in Vietnam. The Tribunal has noted the delegate's concern the engagement and wedding ceremonies did not reflect some traditional features of this type of event in Vietnamese culture, and the representative's response that this contention is unreasonable as people have a prerogative to celebrate such occasions however they wish. The Tribunal acknowledges the representative's submission has some merit. The Tribunal has given this evidence some weight.
100. The photographs reviewed by the Tribunal also show the parties together and in the company of relatives and friends, in a range of settings. The Tribunal has placed some weight on this evidence, albeit with the underlying concern that photographs can be arranged to support the visa application and do not provide a clear insight into how other people in the photographs view the connection between the applicant and sponsor.
101. The Tribunal notes the marriage certificate is an indicator the parties have represented themselves to the Vietnamese authorities as a couple. The evidence before the Tribunal

does not include other clear examples of their otherwise representing themselves as a married couple to friends or the community at large. Medical evidence provided with the review application, which whilst limited in scope, does include discharge summaries from hospitals in both Vietnam and Australia. These medical records do not identify the review applicant as the spouse, next of kin or person responsible for the visa applicant.

102. *The opinion of the parties' friends and acquaintances about the nature of the relationship*

103. An unusual feature of this case is that a review of the documents provided with the visa application and review application reveals an absence of witness support statements from relatives or friends attesting to the nature of the parties' relationship. The Tribunal does not therefore have the benefit of any such evidence when considering the opinion of the parties' friends and acquaintances about the nature of the relationship.

104. The Tribunal is not persuaded by the explanations put forward to explain the absence of the review applicant's daughter at the ceremonies and celebrations associated with the parties' engagement and marriage. The parties acknowledge the close relationship between the review applicant and his daughter. This is evidenced in the medical records from [Hospital] showing the daughter had a clear understanding of the symptoms associated with the review applicant's illness when he was treated there in January 2019. The evidence demonstrated the review applicant and his daughter travel to Vietnam frequently and often together. The apparent decision by the daughter to not attend or participate in the events associated with the parties' marriage gives the Tribunal concern that she either does not support their relationship, or that she does not view it as genuine and therefore something she needed to participate in. The Tribunal has considered the explanation put forward by the parties, namely that the daughter preferred to remain in Australia with her husband and is not persuaded this resolves the concern that she did not support the marriage.

105. *The basis on which the parties plan and undertake joint social activities*

106. The evidence provided with the visa and review applications does contain itemised photographs and travel records, which demonstrate that the parties have spent time together and with relatives in a variety of places in Vietnam and during 2016, in [Country 1]. The evidence supplied does detail the parties undertaking activities together over time, which would have required planning and preparation.

107. *Assessment of the social aspects of the parties' relationship*

108. The Tribunal is satisfied the parties have travelled together and spent time with members of their respective families. I have placed some weight on this factor. As mentioned previously, the Tribunal does not have the benefit of evidence as to the opinion of the parties' friends and acquaintances about the nature of the relationship. I am not satisfied the evidence demonstrates that the parties represent themselves to many agencies and organisations as a married couple and have placed only limited weight on the social aspects of the parties' relationship as an indicator that at the time of this decision they are in a genuine and continuing relationship.

109. **The nature of the persons' commitment to each other**

110. The documents provided with the review application contain untranslated and in the most part, undated Viber communication records. Included with these records is one that includes a photograph of the review applicant. The visa applicant explained these records were provided to show the frequency of contact between the parties. The Tribunal has however placed only limited weight on this evidence in terms of understanding the commitment the

parties have for each other and their relationship, as it is unaware of the content of these interactions.

111. *The duration of the relationship*

112. The parties claim they made a commitment to a relationship with each other in June 2016 and they married in January 2017. The Tribunal has placed some weight upon this factor.

113. *The length of time during which the persons have lived together*

114. The Tribunal is not persuaded the parties lived together on any more than an occasional basis until the review applicant's return to Vietnam in February 2019. The Tribunal has therefore placed no significant weight upon this factor.

115. *The degree of companionship and emotional support that the persons draw from each other*

116. The Tribunal accepts the visa applicant is currently caring for the review applicant and is satisfied that by doing so, she is providing him with a significant degree of companionship and emotional support. The Tribunal has placed weight upon this particular factor.
117. It is less apparent that there was a significant degree of companionship and support between the visa and review applicant around the time of application in 2017. The Tribunal is not persuaded there was the level of communication between the parties at that time which would usually be present between couples in a genuine relationship. This is because concerns arising from the visa applicant's lack of knowledge about the review applicant's daughter and time he had spent in Vietnam with his daughter, which was evident when the visa applicant was interviewed in November 2017. The Tribunal is not satisfied the pair have provided a convincing explanation for the visa applicant's lack of insight into aspects of the review applicant's life that are clearly of importance to him and the type of things that would usually be discussed between a couple who had a significant degree of emotional closeness and companionship. It is of further concern that the visa applicant was unaware of two trips the review applicant made to Vietnam during 2015, after their first meeting. In and of itself, this would not be untoward, given they do not claim to have commenced a committed relationship until in or around June 2016. However, the parties clearly claimed they had contact on each and every occasion the review applicant travelled to Vietnam after their initial meeting and their explanations for the visa applicant's lack of knowledge of two periods of time in which the review applicant travelled to Vietnam during 2015 is in the view of the Tribunal not convincing.

118. *Whether the persons see the relationship as a long term one*

119. The Tribunal does not have a current indication of the review applicant's thoughts about this issue, due to communication difficulties resulting from the advanced state of his [medical condition]. The visa applicant expressed the hope the review applicant's illness could be cured and that they could share a future life together.

120. *Overall assessment of the spouse relationship*

121. In this matter, the Tribunal has placed considerable weight upon the companionship and support currently provided to the review applicant, during a very difficult phase of his life, by the visa applicant. It would appear, from the medical records which have been provided with the review application that the review applicant has been feeling unwell for some time and was diagnosed, whilst in Vietnam in January 2019, with [a medical condition] and discharged himself from hospital against medical advice. It is evident from photographs provided with

the review application that he then returned to Australia in the company of his daughter and after a further brief period in an Australian hospital, where it was ascertained his [medical condition] was at an advanced stage, the review applicant returned to Vietnam where he was again hospitalised. It is claimed that the review applicant was subsequently discharged to the home of the visa applicant where he is reported to be fully reliant on him for assistance with most aspects of his activities of daily living.

122. As a consequence of these circumstances, the Tribunal has placed weight upon the commitment shown by the visa applicant, at the time of this decision, to the review applicant. In the particular circumstances outlined in the preceding paragraph, the Tribunal sees nothing untoward from a lack of evidence about the review applicant's commitment to the relationship at the present time, as he was unable to provide oral evidence to the Tribunal and is in a phase of life where focus frequently shifts to the internal, rather than external environment.
123. Notwithstanding the commitment aspects of the parties relationship at the time of this decision, providing evidence in support of the contention they are in a genuine relationship the Tribunal is required by the Act to consider the overall evidence regarding their relationship, both at the time of application and at the time of decision, in order to determine if they have the required mutual commitment to a shared life together in a relationship that is both genuine and continuing.
124. The submissions from the representative refer to an allegation the parties relationship is contrived, which the parties claim was made by the review applicant's second wife for vexatious purposes. The Tribunal has placed no weight on any such allegation.
125. In relation to the time of application, the Tribunal is not satisfied that the evidence demonstrated that the parties had the aforementioned commitment to a genuine and continuing relationship. Whilst acknowledging the circumstances whereby a visa and review applicant reside in different countries makes their circumstances quite distinct from a situation where they live in the same country, the Tribunal is not satisfied that in or around the April 2017 period, the parties had, to any significant degree, shared regular day to day household expenses, pooled their finances or had any shared assets, debts or legal obligations to each other. The Tribunal is not satisfied that funds were placed in a joint account at a Vietnamese financial institution for a reason other than creating evidence in support of the visa application.
126. There is limited credible evidence the parties had resided together prior to or around the time of application, or that they had at that time established a household together, and the Tribunal has not found photographic evidence convincing with regard to this issue. The Tribunal is not persuaded the parties shared responsibility for the support and care of the visa applicant's [daughters] and there is no claim that the visa applicant had any support or care responsibilities for the review applicant's children. The Tribunal is also not persuaded the parties' had shared responsibility for housework at times the review applicant was in Vietnam prior to, or around the time of application.
127. There is evidence some members of the parties' families attended events associated with the parties' engagement and wedding and that the parties have planned and undertaken some social activities together and in the company of family and friends. However, evidence provided by the parties as to their presenting to the community at large, or friends, as a married couple prior to, or around the time of application is not persuasive.
128. For reasons explained elsewhere in this decision, the Tribunal has unresolved concerns as to the extent to which the parties were in an emotionally supportive relationship with any significant degree of companionship around the time of application. If taken at face value, at

the time of application the parties had been in a committed relationship for less than a year and the Tribunal is not satisfied that would be a sufficient period of time to place significant weight upon. In documents provided with the visa application the parties indicate they saw their relationship as long term; however, unresolved concerns about the reliability of evidence provided by the parties has resulted in the Tribunal having some doubt about this claim.

129. In relation to the circumstances of the parties' relationship at the time of decision, with the exception of the commitment aspects discussed elsewhere in this section and the indication the parties are at the present time sharing a household, there is little indication the remaining aspects of the parties' relationship have changed from what they were around the time of application. Whilst the duration of the claimed relationship is now longer, there remains a concerning lack of overt support from relatives of the parties attesting to the genuine nature of their relationship. There is unfortunately limited apparent scope for the parties' sharing costs associated with daily household expenses or other things at the current time, due to the review applicant's lack of savings, assets or capacity to earn further employment income.
130. As has been acknowledged elsewhere in this decision, the circumstances of this case are unfortunate, unusual and sad. When considered in its totality, the Tribunal is not satisfied that the parties had at the time of the visa application, a mutual commitment to a shared life as husband and wife to the exclusion of all others in a relationship that was genuine and continuing. As to the time of decision, the Tribunal is not satisfied the commitment and household aspects of the parties' relationship are sufficiently distinct from a circumstance where the visa applicant could be regarded as a carer, rather than wife of the review applicant, such that the weight given to these factors could outweigh the limited or no weight that has been accorded to other aspects of their relationship as they are at the time of this decision.
131. The Tribunal has unresolved concerns about the reliability of some of the evidence provided by the parties in support of their claims. In the view of the Tribunal this gives rise to a concern that the relationship was contrived to provide a migration pathway for the visa applicant and her daughters to achieve permanent residency in Australia and that it has subsequently been swept up in changed circumstances caused by the grave state of the review applicant's health.
132. The findings it has made and the Tribunal's consideration of the evidence before it, has resulted in it not being satisfied that at the time of this decision, the parties have the required mutual commitment to a shared life as husband and wife to the exclusion of all in a relationship that is genuine and continuing.
133. The Tribunal therefore finds that the visa applicant does not meet the definition of 'spouse' in s.5F(2)(b)-(d).
134. The visa applicant cannot satisfy cl.309.211(3) because the parties were married at the time of application.
135. As the visa applicant does not meet the definition of spouse she does not meet the requirements of cl.309.211 or cl.309.221.

136. Secondary visa applicants

137. As the Tribunal does not accept that the first named visa applicant satisfies the primary criteria, the secondary visa applicants are unable to meet cl.309.311 because they are not members of the family unit of, and made a combined application with, a person who satisfies the primary criteria in of cl.309.211 or cl.309.221.

138. For the reasons above, the Tribunal finds the visa applicants do not satisfy the criteria for the grant of the visa.

DECISION

139. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

...

- (3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:
- (ad) a Partner (Migrant) (Class BC) visa; or
 - (ae) a Partner (Provisional) (Class UF) visa; or
 - (af) a Partner (Residence) (Class BS) visa; or
 - (ag) a Partner (Temporary) (Class UK) visa;
- the Minister must have regard to all of the circumstances of the relationship, including, in particular:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).
- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.
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